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in the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-542

ROBERT H. SLATKO

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT H. SLATKO
In Proper Person
555 Roberts Building
28 West Flagler Street
Miami, Florida 33130

MIAMI REVIEW — 371-4853 — 377-3721

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Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Robert H. Slatko prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 20, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix at page A1. The judgment and commitment entered by the United States District Court for the Southern District of Florida is unreported and appears in the Appendix at page A9.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 20, 1972, and appears in the Appendix at page A7. A timely petition for rehearing was denied on September 6, 1972, and appears in the Appendix at page A8. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

DOES "FUNDAMENTAL FAIRNESS" PERMIT ONE ACCUSED OF A CRIME TO BE "PENALIZED" BY THE GOVERNMENT FOR PLEADING NOT GUILTY?

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

The Fifth Amendment to the United States Constitution is involved herein as is Rule 11, Federal Rules of Criminal Procedure.

Constitution of the United States, Amendment V: No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Federal Rules of Criminal Procedure, Rule 11: A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

STATEMENT OF THE CASE

An information was filed against the Petitioner (an attorney), charging him in three counts with willful failure to file timely income tax returns for the years 1963, 1964 and 1965 (under 26 U.S.C. §7203), *all misdemeanors.*[1]

The Petitioner entered a plea of not guilty to each count, thereby asserting the fundamental right of one accused of a crime to deny and contest his guilt. Importantly, the Petitioner did not approach the Government to "plea bargain".

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[1]The special agent in charge of the tax investigation recommended that the Petitioner be charged with these misdemeanors and, as well, with the related felonies. These recommendations were then reviewed by both counsel for the Internal Revenue Service and the Tax Division of the Department of Justice. At the final stage of review, both the Internal Revenue Service and the Department of Justice concurred in the conclusion that the Petitioner be prosecuted only for the misdemeanors and not for the felonies.

Eleven months later, as trial of the misdemeanor charges became imminent, the Petitioner was unexpectedly indicted on four *felony* counts.[2] He was charged with attempted tax evasion in connection with his 1964 and 1965 tax returns and with filing false returns for the same two years (under 26 U.S.C. §§7201, 7206).[3] The Petitioner again entered pleas of not guilty.

Thereafter, the Petitioner approached the Government to negotiate a plea agreement, offering to plead guilty to two of the misdemeanor counts (those relating to the years 1964 and 1965) if prosecution on all other counts was dropped. The Government refused, apparently because general policy in tax cases would permit a plea bargain only if the Petitioner entered a plea of guilty to at least one of the felony charges.

Nevertheless, after the first day of trial,[4] the Government changed its position and agreed to drop the felony charges in exchange for guilty pleas to the 1964 and 1965 misdemeanor charges and for a nolo contendere plea to the 1963 misdemeanor charge.

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[2]These were the very felony charges that had earlier been considered and rejected by legal counsel for both the Department of Justice and the Internal Revenue Service. In the exercise of his discretion, the chief prosecutor overrode them. While the decision whether to prosecute a suspected offender is a complex one and (perhaps) best left to prosecutorial discretion, ". . . it does not follow that unbridled discretion should reign supreme". See Wright, *Beyond Discretionary Justice*, 81 Yale L. Jl. 575, 591 (1972). We ask this Court to consider this factor as it relates to whether the machinery of the law has been fairly employed by the Government against the Petitioner.

[3]Each felony count posed the threat to the Petitioner of not only a severe term of imprisonment (up to 5 years) and a substantial fine (up to $10,000), but also automatic disbarment and loss of livelihood.

[4]According to the chief prosecutor, the Government's prosecution of the tax evasion charges went ". . . very, very bad".

The Petitioner accepted the arrangement, and after a hearing in accordance with Rule 11, Fed. R. Crim. P., the district judge accepted his pleas.[5] Thereafter, the Petitioner was sentenced to four months' imprisonment on each of the two convictions resulting from the guilty pleas, to be served concurrently, and to a probationary sentence resulting from the nolo contendere plea. The sentence of imprisonment was stayed for one month.

Then, during that month, the Florida Bar instituted a mandatory grievance proceedings against the Petitioner on account of the misdemeanor convictions. Jose Martinez, the Assistant United States Attorney in charge of the prosecution, appeared at a hearing before the Grievance Committee and testified as to the circumstances surrounding the charges against the Petitioner, including the considerations underlying the Government's decision to bring the late felony charges. From the testimony of Mr. Martinez, the Petitioner concluded that his assertion of the right to plead not guilty (to the misdemeanor charges) had impermissibly influenced the Government's decision to bring the felony charges.

Petitioner immediately moved to withdraw the guilty pleas and, conjunctively, to bar further prosecution on the felony charges. An evidentiary hearing was held on this motion, at which Mr. Martinez again appeared and testified. Mr. Martinez was asked twice whether the unwillingness of the Petitioner to evidence any intention to plead

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[5]The Petitioner does not question that Rule 11, Fed. R. Crim. P., was complied with in full. He understood the nature of the charges and the consequences of the pleas. He also understood the consequences of not accepting the plea bargain; if convicted of felony charges, the Petitioner faced not only substantial imprisonment and fines, but also automatic disbarment.

guilty was a "factor" underlying the Government's decision to bring the felony charges. Those questions and his answers are as follows:

> "MR. SLATKO: Then among the numerous *factors that went into the decision to bring the felony charges* against me there were at least these: (1) *I had evidenced no intention to plead guilty;* . . .
>
> *Were those factors as well?*
>
> MR. MARTINEZ: *Those were some of the factors.* . . ."
>
> • • •
>
> "MR. SLATKO: Did you testify, Mr. Martinez, on October 14 that another *factor underlying the decision to bring the felony charges* was, and I quote, 'that the Government was going to have to go to trial on the misdemeanors anyway' *because I had indicated no intention to plead on any of them — because the defendant had indicated no intention to plead on any of them?*
>
> *Was that a factor, sir?*
>
> MR. MARTINEZ: *Yes.* I don't remember exactly what context I said that in, but I probably did say that because it sounds like what I would say because my recollection is —" (Emphasis added).
>
> • • •

Notwithstanding his unequivocal admissions, the district court orally found that the Petitioner's ". . . failure to

indicate any willingness to enter a guilty plea to the misdemeanor charges [prior to the lodging of the felony indictment] had absolutely nothing to do with the bringing of the felony charges." Based on this inexpicable finding, the district court denied relief.

The Petitioner appealed that judgment to the United States Court of Appeals for the Fifth Circuit, where the judgment of the lower court was affirmed. Thereafter, a timely petition for rehearing was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Every year, the Government accuses tens of thousands of its citizens of committing federal crimes. Some are wrongly accused. This Petition speaks for them as well as for the Petitioner.

The opinion of the court below forces an "incredible dilemma"[6] upon every person wrongly accused of a crime: Should he plead not guilty and run the risk that doing so may be a "factor" in the Government's decision to later bring additional or greater charges against him, that doing so may place him in a far worse position than if he entered pleas of guilty to charges that he knows to be unfounded? Or should he plead guilty, despite his innocence, and avoid that risk?

That dilemma is the complete antithesis of a free and unfettered choice among alternative courses of action.[7]

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[6]*Green v. United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct 221.

[7]*Parker v. North Carolina*, 397 U.S. 790, 25 L.Ed.2d 785, 90 S.Ct. 1458 (Brennan, J., dissenting).

That dilemma serves to chill the exercise of basic constitutional rights.[8] That dilemma is a taint on the administration of justice in the federal courts and, by the standards announced in *Mesarosh v. United States*,[9] is juridically intolerable. In *Mesarosh*, this Court said:

> ". . . This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.
>
> 'The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.' *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115, 124, 76 S.Ct. 663, 668.
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> The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

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[8] *United States v. Jackson*, 390 U.S. 570, 20 L.Ed.2d 138, 88 S.Ct. 1209.

[9] 352 U.S. 1, 1 L.Ed.2d 1, 77 S.Ct. 1.

This Petition raises a substantial and important question concerning the right of one accused of a crime to plead not guilty and "suffer no penalty" for doing so. This is the first reported case involving an admission by a federal prosecutor that the unwillingness of one accused of a crime to plead guilty was a "factor" underlying the Government's decision to later bring felony charges. This Court has not passed on these issues and this case remains unprecedented historically and legally.

POINT I

"FUNDAMENTAL FAIRNESS" DOES NOT PERMIT ONE ACCUSED OF A CRIME TO BE PENALIZED BY THE GOVERNMENT FOR PLEADING NOT GUILTY.

a.

The disposition of criminal charges by "plea bargaining" is an essential component of the administration of justice.[10] Properly administered by the courts, it is to be encouraged for reasons that are too well-known to require recitation here.

The emphasis upon the need for judicial administration arises from the fact that virtually every plea agreement involves a plea of guilty to one or more charges in exchange for some concession by the prosecution (most often, that concession being the dismissal of the remaining charges).[11]

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[10] *Santobello v. New York*, —— U.S. ——, 30 L.Ed.2d ——, 42 S.Ct. 495.

[11] *Brady v. United States*, 397 U.S. 742, 25 L.Ed.2d 747, 90 S.Ct. 1463.

Every guilty plea, whether the result of bargaining or otherwise, is ". . . a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights. . ."[12] of the defendant and, therefore, ". . . must be attended by safeguards to insure the defendant what is reasonably due in the circumstances".[13]

The Supreme Court recently restated the broad test for determining the validity of guilty pleas: it is ". . . whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[14] *But the validity of a guilty plea is not always a purely subjective question as to the defendant's state of mind; it may involve an objective analysis of the fairness of the situation in which the Government placed the defendant.*[15]

The issue of fairness was at the heart of this Court's ruling in *Santobello v. New York.*[16] Santobello was induced to enter a plea of guilty to criminal charges upon the promise that no sentence recommendation would be made by the prosecutor, a promise that was broken. Even though the plea was voluntary and intelligent, it was stricken by the Supreme Court because it was not secured *fairly.*

"Fundamental fairness" requires, at the very least, that one accused of a crime "suffer no penalty" for assert-

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[12]*Santobello v. New York*, supra, (concurring opinion of Justice Douglas).

[13]*Santobello v. New York*, supra.

[14]*North Carolina v. Alford*, 400 U.S. 25, 27 L.Ed.2d 162, 91 S.Ct. 160.

[15]*Kercheval v. United States*, 274 U.S. 220, 71 L.Ed. 1009, 47 S.Ct. 582; *Santobello v. New York*, supra.

[16]*Santobello v. New York*, supra.

ing the constitutional right to plead not guilty — the right to deny and contest his guilt.[17] For that matter, this Court has held that one must "suffer no penalty" for asserting a fundamental right even though that right is not of a constitutional origin (viz. the "right " to appeal a criminal conviction).[18] In the context of these cases, "penalty" means the imposition of any sanction which makes assertion of such rights "costly" in any way.[19]

The Petitioner contends that the exercise of his right to deny and contest his guilt became "costly" inasmuch as it influenced the Government's decision to bring the felony charges against him.[20] Ergo, he was penalized for asserting his right to plead not guilty — a denial of that right and, as well, a denial of "fundamental fairness". In the context of the facts of this case, that denial of "fundamental fairness" is both constitutionally and juridically intolerable.[21]

b.

The Petitioner claims that his unwillingness to plead guilty to misdemeanor charges influenced the Government's decision to bring the felony charges (and his plea

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[17] *United States v. Jackson*, supra.

[18] *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072.

[19] *Malloy v. Hogan*, 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489.

[20] This is not a case in which a prosecutor, having brought charges against a defendant, thereafter discovers new evidence to support the bringing of greater or additional charges. The prosecution in the case at bar has informed the court below that the facts upon which it relied to support the felony charges were all known to the prosecution at the time the earlier misdemeanor charges were brought many months earlier.

[21] *North Carolina v. Pearce*, supra.

of not guilty thereby became "costly"). He bases this claim solely upon the testimony of Jose Martinez, the Assistant United States Attorney in charge of the prosecution, during the hearing on the Petitioner's motion to withdraw his pleas. Mr. Martinez was asked twice whether the unwillingness of the Petitioner to evidence any intention to plead guilty was a "factor" underlying the Government's decision to bring the felony charges. To both questions, the chief prosecutor candidly responded "yes". These questions and answers are as follows:

> "MR. SLATKO: Then among the numerous *factors that went into the decision to bring the felony charges* against me there were at least these: (1) *I had evidenced no intention to plead guilty;* . . .
>
> *Were those factors as well?*
>
> MR. MARTINEZ: *Those were some of the factors.* . . ."[22]
>
> * * *
>
> "MR. SLATKO: Did you testify, Mr. Martinez, on October 14 that another *factor underlying the decision to bring the felony charges* was, and I quote, 'that the Government was going to have to go to trial on the misdemeanors anyway' *because I had indicated no intention to plead on any of them — because the defendant had indicated no intention to plead on any of them?*

[22]The full answer of Mr. Martinez was: "Those were some of the factors. There were others, including the fact that we felt you were guilty of the felony. I think that's probably the major factor".

Was that a factor, sir?

MR. MARTINEZ: *Yes.* I don't remember exactly what context I said that in, but I probably did say that because it sounds like what I would say because my recollection is —" (Emphasis added).[23]

* * *

These words are the only testimony in the record as to the considerations underlying the Government's decision to bring the felony charges. These words are unequivocal; they have only one meaning; they mean only that the unwillingness of the Petitioner to evidence any intention to plead guilty to the misdemeanor charges was a "factor" underlying the Government's decision to bring the felony charges.[24] Inexplicably, the court below, (concurring with the district court) came to the diametrically opposite conclusion: it held that there is ". . . simply nothing in the record to indicate that Slatko's refusal to plead guilty

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[23]The full answer of Mr. Martinez was: "Yes. I don't remember exactly what context I said that in, but I probably did say that because that sounds like what I would say because my recollection is ——".

[24]During his testimony, Mr. Martinez made another germane point. He described his conversation with the Department of Justice after the first day of trial and while attempting to get the Department to acede to the plea agreement which was ultimately reached. He testified that the prosecution team explained the following to the Department: "Well, look, if he had pled to one of the misdemeanors before, you would have taken it, and the only reason we went on the felonies was because we had to prove the exact same evidence, that he was guilty of it, and we thought we should go on the felonies, but what if he had pled guilty before we even filed the felony? You would have let him plead to a misdemeanor then." Clearly, then except for the unwillingness of the Petitioner to plead guilty or plea bargain, the felony charges would never have been brought.

to the misdemeanors in any way influenced the Government's decision to bring the felony charges".

It is beyond doubt that the conclusion of the court below on this pivotal issue is directly contradicted by the only evidence in the record — and is "clearly erroneous".[25]

The Supreme Court has granted certiorari to correct erroneous findings of fact where those findings were totally devoid of evidentiary support (even though the findings received the concurrence of both courts below).[26] In the instant case, the pivotal conclusion by the two courts below is not only devoid of evidentiary support but is completely contradicted by the only evidence in the record. If it is clearly erroneous to base findings of fact upon "no evidence", it is the more so where the only evidence in the record completely contradicts that finding.

POINT II

HAVING UNFAIRLY LODGED THE LATE FELONY CHARGES AGAINST THE PETITIONER AND BROUGHT THAT THREAT TO BEAR UPON HIM, IS THE BURDEN ON THE PETITIONER TO PROVE THAT HIS

[25]The direct contradiction between the testimony of Mr. Martinez and the conclusion of the Court is very obvious. In this context, and during oral argument before the Court of Appeals, counsel for the Government was asked from the Bench whether Martinez had testified that one of the factors underlying the Government's decision to bring the felony charges was the unwillingness of the Defendant to plea bargain or plead guilty. Counsel for the Government candidly responded that, indeed, Martinez had made this statement. And, of course, this is precisely what Martinez did testify.

[26]*Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624.

GUILTY PLEAS WERE CAUSED SOLELY BY THAT THREAT, TO THE EXCLUSION OF ALL OTHER POSSIBLE INFLUENCES? OR, CONVERSELY, IS THE BURDEN UPON THE GOVERNMENT TO DEMONSTRATE THAT ITS "FUNDAMENTALLY UNFAIR" CONDUCT DID NOT INDUCE THE GUILTY PLEAS?

a.

If this Court agrees that the Petitioner was placed in an unfair position by the conduct of the Government, the question of "causation" remains: were the Petitioner's guilty pleas the result of the threat posed by the presence of the "punitive" felony charges. The Petitioner argues that, having unfairly placed him in a position where that threat was present, the Government should not be permitted to demand that the Petitioner prove he would not have tendered the guilty pleas as he did except for that threat. Such a burden would pile unfairness upon unfairness. As was stated by this Court in *Harrison v. United States:*

> "The remaining question is whether the petitioner's trial testimony was in fact impelled by the prosecution's wrongful use of his illegally obtained confessions. It is, of course, difficult to unravel the many considerations that might have led the petitioner to take the witness stand at his former trial. But, having illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. 'The

> springs of conduct are subtle and varied,' Mr. Justice Cardozo once observed. 'One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.' Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony".[27]

However, should this Court disagree and require the Petitioner to demonstrate that it was the Government's conduct that caused him to plead guilty to the misdemeanors, the record amply demonstrates that conclusion.

First, the most reasonable conclusion to be inferred from the uncontroverted facts is that the threat posed by the presence of the punitive felony charges was the cause, at least in part, of the guilty pleas.* Second, that conclusion is strengthened by an objective analysis of the statement made by counsel for the Petitioner when tendering the pleas of guilty.[28] Third, and most importantly, it is simply a matter of common sense that so severe a threat as that posed by the presence of the punitive felony charges must have influenced the Petitioner's decision to plead

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[27]392 U.S. 219, 20 L.Ed.2d 1047, 88 S.Ct. 2008.

*The Petitioner pleaded not guilty to the misdemeanors — and was unwilling to plea bargain. It was only after the late felony charges were lodged that the Petitioner sought and accepted a plea agreement.

[28]During that hearing, counsel for the Petitioner stated that the pleas were based on the *Alford* case, the recent decision of the Supreme Court allowing acceptance of guilty pleas under Rule 11 even where the defendant is unwilling to admit committing the crime. He also stated that, had the trial proceeded, the court would have been faced with the issue whether the admittedly late filing had been ". . . willful within the meaning of the statute and that would have presented a substantial question . . ." to the court.

guilty; it could not have failed to do so.[29] The severity of that threat is beyond doubt. If convicted on the felony charges, the Petitioner faced not only substantial imprisonment and fine, but also automatic disbarment. To this Petitioner, disbarment meant the loss of professional standing, professional reputation, *and of the ability to earn a livelihood at the only trade known to him.*[30]

As a practical matter, once the punitive felony charges had been lodged, the Petitioner had absolutely no choice but to seek a plea agreement involving the dismissal of the felony charges. As an attorney, he fully recognized the precariousness position confronting any accused in defending a tax fraud prosecution and the uncertainty of its outcome. Threatened with the sanctions that would have resulted from the conviction on the punitive felony charges, the defendant made the only rational choice left to him: he accepted a plea bargain that would free him of such a threat.

Obviously, the Petitioner would have faced the same threat (posed by the presence of the felony charges) had the felony and misdemeanor charges been brought simultaneously. However, they were *not* brought simultaneously and that is precisely the point. The later charges were the product, at least in part, of the unwillingness of the defendant to plead guilty to the earlier charges. That circumstance cannot be present in a situation in which one is accused simultaneously of both felonies and misdemeanors.

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[29]*Spevak v. Klein*, 385 U.S. 511, 17 L.Ed.2d 574, 84 S.Ct. 625.

[30]Put simply, a conviction of just one felony count meant my destruction as a lawyer. It defies reason to believe that so severe a threat could have failed to influence my decision to plead guilty.

Even though the Petitioner believes that the record amply demonstrates the guilty pleas to have been the product of the threat posed by the "punitive" felony charges, he reiterates the position taken earlier that it should not be his burden to establish that fact. Having placed the Petitioner under the threat of the felony charges, the burden should be upon the Government to demonstrate that its illegal action did not induce the guilty pleas.

ADDITIONAL CONSIDERATIONS

a.

The Government has argued — and the court below agreed — ". . . that the effect of the late bringing of the felony charges was no more coercive of a guilty plea on the misdemeanor counts than a simultaneous indictment on all counts would have been". This conclusion erroneously presupposes that the validity of a guilty plea is always a purely subjective question as to a defendant's state of mind (viz., whether he was "coerced"); it fails to consider the *fairness* of the situation in which the Government placed the defendant.

For example, suppose that Mr. Martinez had testified before the district court that (1) upon undertaking preparation of the misdemeanor cases for trial, he concluded they were "losers" if tried by themselves;[31] (2) he concluded that the odds of a jury returning a compromise verdict of guilty on the misdemeanors would be increased if the jury also had felony charges to consider; and (3) the felony charges were baseless. Beyond doubt, this Court would reject the obvious unfairness inherent in that illustration even though the effect of the late bringing of the

[31] In fact, this is precisely what Mr. Martinez did testify.

felony charges was no more coercive of a guilty plea on the misdemeanor counts than a simultaneous indictment on all counts would have been. The question is not always the subjective one: was the plea coerced? In certain cases—and this is such a case—the question should be: Was the plea secured "fairly"?

b.

Incredibly, the court below states it to be the contention of the Petitioner that the prosecution's motive in bringing the felony charges was to coerce the guilty pleas, an "evil motive". In the three pages of opinion that the court below employs to explain its reasoning, two and one half pages are devoted to demonstrating that the record does not support the Petitioner's "contention of the prosecution's evil motive". It is beyond comprehension that the court below understood this to be the contention of the Petitioner in view of the fact that the brief filed by the Petitioner (in the proceedings below) *stated the exact opposite.* The Petitioner's brief stated unequivocably that he ". . . *has not contended* that the felony charges were brought with the intent to coerce him into guilty pleas".

The Petitioner had two principal reasons for staying away from the contention that the Government had an "evil motive" in bringing the felony charges. First, he could not possibly prove it, even if true. Second, and more importantly, it is completely immaterial whether or not the Government had an "evil motive" in bringing the felony charges. It was settled in *Brady v. Maryland*,[12] that a federal prosecutor may not be cast ". . . in the role of an architect of a proceeding that does not comport with

[12]373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1191.

standards of justice. . ." and *his good faith or bad faith is completely immaterial.* That the Government's conduct was not guileful ". . . did not lessen its impact".[31]

c.

The Petitioner is not seeking simply to withdraw the guilty pleas; that would leave him facing the threat of the very felony charges complained of herein. He seeks to withdraw the guilty pleas only if further prosecution of the felony charges is barred conjunctively. It is only by such a conjunctive order that he may tender a plea to the misdemeanor charges without the threat posed by the presence of the punitive felony charges.

If the effect of such an order is to enable the Petitioner to avoid prosecution on the felony charges without a determination of his guilt or innocence, it is only because the Government has created the circumstances in which there is no other form of relief which the Petitioner can reasonably seek.

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[31] *Santobello v. New York*, supra.

CONCLUSION

In the end, the ultimate question posed by this case is whether the machinery of the law was fairly used by the Government to bring about the Petitioner's pleas of guilty. It is respectfully submitted that the only answer that can be reached on the record is "no, it was not" and the Petitioner is entitled to the only relief sought by him: the opportunity to plead to the misdemeanor charges without the threat posed by the "punitive" felony charges. For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Miami, Florida 33130

October , 1972.

APPENDIX

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-3437

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT H. SLATKO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(July 20, 1972)

Before RIVES, BELL and MORGAN,
Circuit Judges.

RIVES, Circuit Judge: Once again we are asked to review the propriety and constitutionality of a plea bargaining agreement. In 1964-65 the Government undertook an investigation of Robert Slatko, an attorney, for possible violations of income tax laws. Slatko had not

filed timely tax returns for those two years. At the close of the investigation Slatko did file returns for 1964 and 1965. Nonetheless, the Government indicted him on three misdemeanor charges (under 26 U.S.C. § 7203) for willful failure to file timely returns for the years 1963, 1964, and 1965. Slatko pleaded not guilty to all three counts. He contended that he had filed a timely return for 1963 (but that the Government had apparently lost it) and that, although his returns for 1964 and 1965 were admittedly late, the lack of timeliness was not willful.

After several continuances and before trial, the Government indicted Slatko on four felony counts — filing perjured statements in connection with his 1964 and 1965 returns, and evading taxes for the same two years. 26 U.S.C. §§ 7201, 7206. Slatko again entered pleas of not guilty. On December 29, 1970, the felony charges and the misdemeanor counts were consolidated for trial. Thereafter Slatko approached the Government, offering to plead guilty to two of the misdemeanor counts (those relating to the years 1964 and 1965) if prosecution on all other counts was dropped. The Government refused, apparently because general policy in such cases would permit a plea bargain only if Slatko entered a plea of guilty to at least one of the felony counts. Nevertheless, on June 9, 1971, after the first day of trial, the Government changed its position and agreed to drop the felony charges in exchange for a nolo contendere plea to the 1963 misdemeanor charge and for guilty pleas to the 1964 and 1965 misdemeanor charges.

Slatko accepted the arrangement, and after a full hearing in accordance with Rule 11, Fed.R.Crim.P., the district judge accepted his pleas. Then, in October of

1971, the Florida Bar instituted a mandatory grievance proceeding against Slatko on account of his criminal conviction. Jose Martinez, who was the chief prosecuting attorney for the Government at Slatko's trial, testified as to the facts and circumstances involved in Slatko's case. Thereafter, Slatko asked the district court to allow him to withdraw his pleas on the misdemeanor charges. Moreover, Slatko prayed for an injunction against prosecution on the felony counts. His theory for relief was two pronged: (1) Mr. Martinez, in his testimony to the Bar committee, revealed that Slatko's "Fifth Amendment right not to plead guilty [on the misdemeanor counts] did intrude into the mix of considerations underlying the prosecutorial decision to bring felony charges against him." (Appellant's Reply Brief at 2.) As such, said Slatko, the plea bargaining process was constitutionally infected. (2) Regardless of the Government's motive in bringing the felony charges, the effect of such action was to coerce a plea of guilty on the misdemeanor counts.

After a full hearing, at which Martinez again testified, the district court denied relief. In his oral findings the district judge first reasoned that the effect of the late bringing of the felony charges was no more coercive of a guilty plea on the misdemeanor counts than a simultaneous indictment on all counts would have been. Moreover, he found as a matter of fact that Slatko's "failure to indicate any willingness to enter a guilty plea to the misdemeanor charges [prior to the lodging of the felony indictment] had absolutely nothing to do with the bringing of the felony charges." (App. at 188). The district court's fact finding was not clearly erroneous and its legal conclusions are eminently sound. Accordingly, we affirm the judgment.

U.S.A. v. ROBERT H. SLATKO

I. The Prosecution's Motive in Bringing the Felony Charges.

Martinez testified at length as to the circumstances leading up to the felony indictment. He stated that in preparing to try the misdemeanor charges he delved thoroughly into the facts of the case. Thereupon he concluded, despite an earlier recommendation to the contrary by "Washington," that Slatko was "guilty of the felony." (App. at 119.) This conclusion was the "major factor" in bringing felony charges. (App. at 120). Moreover, it became clear that much of the evidence necessary to obtain a misdemeanor conviction was the same evidence which would have been required to prove the felony charges. Accordingly, said Martinez, he recommended asking the grand jury for a felony indictment.

At one point during his testimony to the Bar committee, Martinez stated that while involved in pretrial preparation he resolved that if the Government went to trial on the misdemeanor only its case was a "loser." From this statement Slatko infers that the felony charges were brought so as to induce a guilty plea, thereby avoiding an unsuccessful prosecution. But Martinez's explanation of this statement is more persuasive. Put simply, he believed the Government had a far better case on the felony counts than on the misdemeanor charges.[1]

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[1]To prove the misdemeanors charged, the Government would be required to show that Slatko's late filing was willful. He had several explanations for his tardiness: that he did not have available the facts and figures to file on time because much of his income was derived from foreign investments and that he was embroiled in domestic difficulty and simply overlooked the necessity for seeking an extension of time in which to file. On the other hand, Martinez was convinced that he could prove evasion on the basis of the tax returns actually filed.

Slatko would also attribute an evil motive to the Government since Martinez stated that there was no reason for Slatko to plead guilty on any of the misdemeanor charges prior to the felony indictment. As Martinez explained, Slatko might as well have gone to trial on all the misdemeanor counts because, even if convicted on all three, the likelihood was that he would receive concurrent sentences. Yet this realization would be apparent to any competent lawyer. And importantly, after bringing the felony charges the Government did not approach Slatko with a bargain but, on the contrary, repeatedly refused Slatko's approaches. As Martinez testified: "Mr. Kasanoff [Slatko's counsel] kept bugging us to let you plead to the misdemeanor[s] only during the entire pretrial procedure and up until the time we were able to convince Washington that we should." (App. at 116). It was only after a full day of trial, when the Government apparently realized that a felony conviction would be difficult to obtain owing to the complexity of the case,[2] that the Government acceded to Slatko's requests.

Put shortly, we agree with the district judge that there is simply nothing in the record to indicate that Slatko's refusal to plead guilty to the misdemeanors in any way influenced the Government's decision to bring the felony charges. Of course, the Government cannot threaten baseless prosecutions to induce a guilty plea. See Machibroda v. United States, 1962, 386 U.S. 487; Brady v. United States, 1970, 397 U.S. 742, 751 n. 8. But in this case there is no evidence that the felony charges were baseless or that the charges were brought to induce

[2]As Martinez testified before the Bar committee: "The first day we felt that our tax evasion charges were going very, very badly." Bar Committee Transcript at 62.

a plea. Accordingly, Slatko's appeal on that ground must fail.

II. The Coercive Effect of the Felony Charges.

The propriety of plea bargaining has long been the subject of heated debate. Yet the Supreme Court has unequivocally put its stamp of approval on the process. North Carolina v. Alford, 1970, 40 U.S. 25; Parker v. North Carolina, 1970, 397 U.S. 790; Brady, supra. If the plea is knowingly and freely given it is constitutionally permissible. Id. In this case Slatko does not contend that he was unaware of the maximum penalty for or the consequences of a conviction on the misdemeanor counts. The trial judge fully advised him on that score. Rather, Slatko argues that the situation in which he was involved was instinct with coercion. Be that as it may, the Supreme Court in Brady noted with approval the practice of pleading guilty to get the prosecutor to drop some counts. That the felony charges in this case were brought long after the misdemeanor charges does not alter our conclusion that Slatko's plea was voluntary.

The judgment below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3437

D. C. Docket No. 70-44-CR.PF
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT H. SLATKO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before RIVES, BELL and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 20, 1972

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-3437

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERT H. SLATKO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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(Filed Sept. 6, 1972)

ON PETITION FOR REHEARING

Before RIVES, BELL and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 70-44 CR-PF

UNITED STATES OF AMERICA
v.

ROBERT H. SLATKO

Filed Sep. 20, 1971

On this 20th day of September, 1971 came the attorney for the government and defendant appeared in person and By Counsel, Robert Kasanof, Esq.

It is adjudged that the defendant upon his plea of Nolo Contendre as to Count One and a plea of Guilty as to Counts Two and Three has been convicted of the offense of willfully and knowingly failing to make income tax returns in violation of Title 26 United States Code Section 7203, for each of the three fiscal years ending on October 31, 1963, on October 31, 1964 and on October 31, 1965. as charged In Counts One, Two and Three of the Information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) MONTHS on Counts TWO (2) and THREE (3), or until otherwise discharged by due process of law, said sentences of confinement to run concurrently with each other, it being further,

ORDERED AND ADJUDGED that as to Count ONE (1) imposition of Sentence of Confinement shall be withheld and Defendant placed on Probation for a period of THREE (3) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964 it being further,

ORDERED that the sentence of confinement begin on November 1, 1971 and that the Defendant present himself to The United States Marshal at Miami, Florida on November 7, 1971.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Peter T. Fay

PETER T. FAY
United States District Judge

Clerk.

The Court recommends commitment to
EGLIN AIR FORCE BASE.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-542

ROBERT H. SLATKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After one day of trial in the United States District Court for the Southern District of Florida, petitioner entered a plea of nolo contendere to having willfully failed to file an income tax return for 1963, and a plea of guilty to having willfully failed to file income tax returns for 1964 and 1965, all misdemeanors in violation of 26 U.S.C. 7203. (The government dismissed four felony counts under 26 U.S.C. 7201 and 7206(1) charging attempted willful tax evasion and the filing of false returns under the penalties of perjury for the years 1964 and 1965.) Petitioner was sentenced to concurrent terms of imprisonment for four months on

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the second and third counts and was placed on probation for three years on the first count. The district court denied petitioner's subsequent motion to withdraw his pleas and to enjoin prosecution on the felony counts. The court of appeals affirmed (Pet. App. 7).

On January 5, 1970, an information was filed against petitioner, an attorney, charging him with three misdemeanor violations of 26 U.S.C. 7203, for willful failure to file timely income tax returns for the years 1963, 1964 and 1965. On May 15, 1970, petitioner entered pleas of not guilty to the three-count information. While the attorneys in the United States Attorney's office and the Department of Justice were reviewing the case in preparation for trial, the chief prosecutor concluded that there was cause to believe that petitioner was guilty not only of the misdemeanors but also of four felonies of willfully attempting to evade tax and of willfully making and subscribing false tax returns (Tr. 39, 40, 52, 53).[1] The grand jury subsequently indicted petitioner on those four counts (Pet. App. 2).

Between the time of indictment and the first day of trial, June 7, 1971, petitioner approached the government on several occasions with offers to plead guilty to two of the misdemeanor counts, provided the other

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[1] "Tr." refers to the court reporter's Transcript of Proceedings, November 23, 1971, a copy of which is being lodged herewith.

Prior to transfer of the case to the United States Attorney's Office for the Southern District of Florida, differing recommendations had been made, pro and con, as to the institution of a felony prosecuted, by the investigating special agent, and the reviewing authorities at the Internal Revenue Service and the Tax Division of the Justice Department (Tr. 65-69).

counts were dismissed (Tr. 36, 54, 55). These offers were rejected because of the long-standing policy of the Department of Justice and the United States Attorney's office not to accept guilty pleas only to misdemeanors when felony and misdemeanor charges are joined (Tr. 56, 57). Prior to the trial, the government initiated no negotiations with reference to any plea by petitioner (Tr. 54, 55).

On June 8, 1971, after one day of trial, the government acceded to petitioner's offer to plead nolo contendere to the 1963 misdemeanor charge and guilty to the 1964 and 1965 misdemeanor charges in exchange for dismissal of the felony counts (Tr. 62-65). After a full hearing in accordance with Rule 11, Fed. R. Crim. P., petitioner's pleas were accepted by the district court (Pet. App. 2).

Prior to execution of the sentence, mandatory grievance proceedings were brought against petitioner by the Florida Bar Grievance Committee on the basis of the misdemeanor convictions (Pet. App. 3). Petitioner thereupon moved in the sentencing court to withdraw his guilty pleas and to bar prosecution of the felony charges, alleging that the testimony of the chief prosecutor, Jose Martinez, during the Florida Bar proceedings revealed that the government had brought the felony charges because petitioner was unwilling to plead guilty to the earlier misdemeanor charges (Pet. App. 3).

After an evidentiary hearing on November 23, 1971, the district court denied the motion (Pet. App. 3), the court of appeals subsequently affirmed (Pet. App. 7), and rehearing was denied (Pet. App. 8).

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There is no reason for further review of this case. Petitioner's basic contention is that he was unfairly induced by the subsequent indictment on felony charges to change his original pleas of not guilty to the misdemeanor charges.

But petitioner does not dispute that his pleas of guilty were entered in accordance with Rule 11, Fed. R. Crim. P. (Tr. 11; Pet. 5). Petitioner further admits that he offered his guilty pleas to free himself of the possibility of a felony conviction (Tr. 11; Pet. 17), in other words, that he concluded that an admission of guilt and avoidance of a full trial on the merits was in his best interests. In these circumstances, his anticipation of a possible felony conviction did not vitiate petitioner's "free and rational choice." *North Carolina* v. *Alford,* 400 U.S. 25, 31.

Petitioner's claim (Pet. 11-14) that the government brought the felony indictment in order to induce him to change his pleas to the misdemeanor charges is without merit. As the district court found, petitioner's prior "failure to indicate any willingness to enter a guilty plea * * * had absolutely nothing to do with the bringing of the felony charges" (Pet. App. 3). Martinez testified at the hearing on petitioner's motion that the paramount factor in the government's decision to bring the felony charges was the good faith belief that the evidence showed petitioner was guilty of the felonies (Tr. 39, 40, 52, 53) and that the felony charges were warranted (Tr. 27, 29, 37, 38). Petitioner apparently does not challenge the prosecutor's judgment on the issue of whether the evidence could support a felony conviction; indeed, petitioner's willingness to

enter into a "plea bargain" indicated his belief that a felony conviction was at least a significant possibility. In these circumstances the felony indictments represented an appropriate exercise of prosecutorial discretion, especially in light of the fact that the felony charges and the ongoing misdemeanor prosecutions involved related issues of fact and law which could be appropriately tried together.

On this record the trial court properly exercised its discretion in denying petitioner's motion. See *United States* v. *Spragg*, 439 F. 2d 800 (C.A. 5).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

☆ U.S. Government Printing Office: 1972—489-428/323

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